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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 PETER D. PETROSKY,

10 *Petitioner,*

11 vs.
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13 JACK PALMER, *et al.,*

14 *Respondents.*
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3:10-cv-00361-RCJ-RAM

ORDER

16 This represented habeas matter under 28 U.S.C. § 2254 comes before the Court for
17 initial review of the counseled amended petition (#13) under Rule 4 of the Rules Governing
18 Proceedings under Section 2254. On initial review, a substantial question exists as to
19 whether the amended petition is subject to dismissal as a mixed petition due to the presence
20 of unexhausted claims. Petitioner therefore will be directed to show cause in writing why the
21 petition is not subject to dismissal as a mixed petition.

22 ***Background***

23 Petitioner Peter Petrosky seeks to set aside his December 4, 2008, Nevada state
24 conviction, pursuant to a guilty plea, of two counts with lewdness with a child under fourteen
25 years of age. Petitioner did not file a direct appeal. He challenged the conviction and/or
26 sentence via, *inter alia*, a first state post-conviction that was mailed for filing on or about
27 March 16, 2009, and filed on March 23, 2009. The state supreme court affirmed the denial
28 of the first petition on the post-conviction appeal, and the remittitur issued on June 4, 2010.

1 A question further arises as to whether Grounds 1(b) and 1(d) are completely
2 exhausted.

3 In Ground 1(b), petitioner alleges that he was denied effective assistance of counsel
4 when trial counsel failed to conduct any investigation prior to advising him to enter a plea. He
5 alleges specifically that counsel: (1) failed to investigate circumstances that the victims'
6 mother, Lisa Idso, previously had threatened to falsely accuse Petrosky of child molestation
7 when he sought to evict her from his house; (2) failed to seek discovery from the State,
8 including transcripts of the original interviews of the children, Lisa Idso, and two other
9 witnesses, which allegedly would have provided exculpatory evidence, including evidence that
10 the police interviews of the children and Idso were suggestive, deceptive and/or coercive; and
11 (3) failed to seek Idso's case file from the criminal case brought against her by the State for
12 child endangerment, allegedly to secure her cooperation with the State.¹

13 On the state post-conviction appeal, petitioner presented only facts pertaining to
14 subparagraph (1) above. He did not present any facts pertaining to subparagraphs (2) and
15 (3).² In order to fairly present and exhaust a claim, a petitioner must present both the
16 operative facts and the legal theory upon which his claim is based. *Castillo, supra*. Petitioner
17 therefore must show cause why the amended petition is not subject to dismissal as a mixed
18 petition because the operative facts under subparagraphs (2) and (3) above in Ground 1(b)
19 were not presented to the state courts.

20 In Ground 1(d), petitioner alleges that he was denied effective assistance of counsel
21 when trial counsel failed to investigate or present any mitigation evidence on his behalf at
22 sentencing. He alleges specifically that counsel: (1) should have obtained a psychosexual
23 evaluation of Petrosky that "could have" addressed the concerns of the State and the court
24 as to a risk of recidivism; (2) should have uncovered mitigating evidence about his
25 background, including that his mother died when he was young and that he was raped by a
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27 ¹#13, at 11-12.

28 ²#16, Ex. 47, at 6-10 (appellant's opening brief); *id.*, Ex. 53, at 2 (order of affirmance).

1 neighbor a short time after her death; and (3) should have presented evidence regarding his
2 solid work history, ties to the community, and home ownership, including testimony from his
3 family.³

4 On the state post-conviction appeal, petitioner presented only facts pertaining to
5 subparagraph (1) above. He did not present any facts pertaining to subparagraphs (2) and
6 (3).⁴ In order to fairly present and exhaust a claim, a petitioner must present both the
7 operative facts and the legal theory upon which his claim is based. *Castillo, supra*. Petitioner
8 therefore must show cause why the amended petition is not subject to dismissal as a mixed
9 petition because the operative facts under subparagraphs (2) and (3) above in Ground 1(d)
10 were not presented to the state courts.

11 IT THEREFORE IS ORDERED that, within twenty-eight (28) days of entry of this order,
12 petitioner shall SHOW CAUSE in writing why the petition should not be dismissed without
13 prejudice for lack of exhaustion, on the basis that: (a) Grounds 1(a), 1(c), and 2 are not
14 exhausted; and (b) Grounds 1(b) and 1(d) are not completely exhausted.

15 IT FURTHER IS ORDERED that respondents shall respond to petitioner's response
16 within twenty-eight (28) days of service of the response. Petitioner may file a reply
17 memorandum within fourteen (14) days of service of the response.

18 DATED: This 31st day of January, 2012.

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22 ROBERT C. JONES
23 Chief United States District Judge
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27 ³See #13, at 13-14.

28 ⁴#16, Ex. 47, at 6-7 & 10-11; *id.*, Ex. 53, at 2-3.